U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: April 28, 1998

CASE NO.: **97 INA 486**

In the Matter of:

PIZZA EXPRESS,
Employer

on behalf of

VICTOR MANUEL OLIVARES,
Alien

Appearance: Mary LaJeunesse, Agent, of El Paso, Texas

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of VICTOR MANU OLIVARES ("Alien") by PIZZA EXPRESS ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at Dallas, Texas, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On February 12, 1996, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Manager" in the Employer's Pizza Restaurant. AF 72. The position was classified under DOT Occupational Code No. 187.167-106, as a Manager, Food service.[2] The Employer described the job duties as follows:

> Order all food, solicit business, nutritionist, personnel, keep books, make reports, bank deposits, receive & inspect food shipments, work schedules, open & close restaurant. Supervise employees.

AF 72. The hours were 8:00 AM to 5:00 PM in a forty hour week at $13.16 per hour. The education required was a baccalaureate degree in any discipline and the experience required was two years in the Related Occupation of Nutrition. The other Special Requirement was that the worker must be bilingual.[3] It later became evident that the second language required was Spanish, although this was not indicated in the Employer's application. Five U. S. workers applied for this position in response to Employer's advertisement, but none of them was offered the job by the employer. AF 49-50.

Notice of Findings. Subject to the Employer's rebuttal under 20 CFR § 656.25(c), the CO denied certification in the Notice of Findings ("NOF") dated November 29, 1996. AF 45-48. The CO noted that Employer seeks to recruit a manager for a pizza restaurant and that the Employer requires a baccalaureate degree in any discipline, with two years' vocational experience in "nutrition." The CO then commented,

> It appears that the requirements for the job have been tailored to meet the alien's background and qualifications and are not normal requirements for the occupation in the area of intended employment. This results in an unduly restrictive requirement which precludes referral of otherwise qualified U. S. workers. "Tailoring" means the job requirements match the alien's qualifications so closely that few if any other workers

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

[3]The Alien's qualifications consisted of a baccalaureate degree in Zoolecnista in the Field of Animal nutrition, with certificates showing added training in Animal Production, Public Relations, and Human Relations. His vocational background was as a customs inspector of people and vehicles for thirteen years from 1976 to 1989, and as the owner and manager of a kindergarten in Juarez from 1989 to the date of application.

> would qualify for the position. Thus, the requirement violates [20 CFR §] 656.21(b)(2)(i)(A) because it is not normally required for the job.

The CO continued,

> Typically, managers of fast food establishments are not required to possess experience in nutrition or the ability to be bilingual. While a bachelor's degree, experience in nutrition, and bilingual ability may prove advantageous, the absence of such knowledge does not appear to preclude one from performing the basic job duties. It appears that the requirements are a preference, not a business necessity and as such are restrictive and preclude referral of otherwise qualified U. S. workers. Al restrictive requirements must be justified or in the absence of justification, deleted from the job order and advertisement.

AF 47. The CO observed that the requirements for a bilingual ability and experience in nutrition were not found by the Dictionary of Occupational Titles ("DOT") to be normal requirements for this type of work in the United States and found that U. S. workers were rejected for reasons that were neither lawful nor job-related under 20 CFR § 656.21(b)(6). Concluding that the Employer's job requirements were unduly restrictive and the CO said, "The employer may rebut this finding by documenting the business necessity of all job requirements or by amending or deleting them." In addition, the CO specified the supporting evidence that the Employer was required to file in order to rebut the findings. AF 48.

Rebuttal. The Employer's January 13, 1997, rebuttal addressed the issues stated in the NOF. AF 28-41. In reference to the discussion of nutrition the Employer asserted that it intended to "expand into the more health conscious segment of the market and offer foods that are lower in calories and saturated fats. I am not associated with any fast food chain and as such have to develop my own menu which requires an employee with nutritional experience." AF 29. In addition, the Employer included 1990 census data for New Mexico to show the demographic basis for the need for bilingual facility in his business. Based on this data only the Employer asserted that this demonstrated that some sixty percent of his business was conducted in Spanish. The documents in the rebuttal included a FAX message by the Employer advising the Agent appearing in this matter that it does not require a degree, but that it prefers one "if the person has little experience." AF 32.[4]

Second NOF. On February 19, 1997, the CO issued a second NOF. AF 22-27. The CO now cited 20 CFR §§ 656.20(c)(8), 656.21(b)(2) at subsections (A)(B) and (C), and 656.21 (b)(2)(iv) in explaining the reasons supporting the denial of alien labor certification for this applicant. The CO now noted that the Employer had rejected the six U. S. workers who applied for this position, citing 20 CFR § 656.21(b)(6). The CO found that this Employer was required to prove that this job is clearly open to any qualified U. S. worker; that the job description does not

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[4]The sample menu offered included pizzas, pastas, salads, and sandwiches, all of whose featured ingredients appeared typical of this genre of piazza restaurant. AF 39-40.

state unduly restrictive hiring requirements; that the job requirements are those defined for the position in the DOT and do not require facility in a language other than English; and that the Employer rejected U. S. workers seeking the position for reasons that were lawful and job-related. The CO added that any employer preference included in the job description is deemed to be a job requirement in determining this Employer's entitlement to certification. The CO then specified the reasons that the rebuttal evidence was inadequate to support this application for certification and, in providing the Employer a second opportunity to rebut the basic findings of the NOF, the CO presented the reasons for requiring particular types of evidence to prove the Employer's entitlement to the relief it seeks in its application. AF 24-27.

Second Rebuttal. On April 15, 1997, the Employer's rebuttal reviewed the CO's second NOF and offered comments in response. AF 05-21. In addition, the Employer spoke of its plans to expand this business and its hope to make changes in the type of food offered in its menu, offering random pages from an industry magazine that provided samples of what various restaurateurs regarded as "healthy" cuisine.[5]

Final Determination. The CO denied certification in the Final Determination issued on May 30, 1997. Noting the Employer's rebuttal, the CO observed that the February 19, 1996, NOF had requested specific information to support Employer's job requirements because Employer's initial rebuttal to the November 29, 1996, NOF because Employer's initial rebuttal to the November 29, 1996, NOF did not present sufficient documentation to support the job requirements set forth in the ETA 750, Part A. Listing the newly filed exhibits, the CO said Employer had failed to provide the information specified in the February 19, 1997, NOF. "The employer did not document the education, work experience, and bilingual requirements by presenting the requested information; the employer did not include any position descriptions of similar positions within the organization, all of which were requested in the Notice of Findings." AF 02. The CO noted Employer's admission that it could not find another comparable business with a nutritionist on staff and found that the Employer's exhibits did not support its requirement that the worker hired be bilingual, have a baccalaureate degree, or qualify with two years of work experience in nutrition. Concluding that Employer's job requirements were not proven to be normal to this occupation or the restaurant industry, that they are a preference and not an actual business necessity, and that they are unduly restrictive, the CO denied certification.

Appeal. On July 2, 1997, the Employer requested a time extension and on September 23, 1997, the Employer appealed, citing as its reasons the arguments in its rebuttal statements.

Discussion

It is well established that the Employer was clearly required to submit specific data that it

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[5] As the Employer again filed the FAX transmission in AF 32 in AF 19, it is inferred that the Employer agreed and relied upon the comments stated in behalf of another pizza restaurant operator that said it did not "require a degree," adding that "we do prefer one if the person has little experience." AF 19. (Emphasis as in original.).

failed to disclose in either its application or its rebuttal despite the explicit, timely directions of the NOF. **GenCorp**, 87 INA 659 (1988) (*en banc*). While an employer may adopt any qualifications it may fancy for the workers it hires in its business, its use of restrictive job criteria is limited by 20 CFR § 656.21(b)(5) when employer applies for certification to hire an alien for the job at issue.

20 CFR § 656.21(b)(5) requires an employer to establish that its job qualifications for the position offered are its actual minimum requirements for the job, that it has not in the past hired workers with less training or experience to perform work similar to duties of the position at issue, and that it is not feasible to hire workers with less training or experience than is normally required by the job it now seeks to fill. The Employer's two rebuttals failed to prove that the hiring restrictions it imposed on the position it offered were its actual minimum requirements for the job. Not only were the job requirements grossly inconsistent with the DOT, but on their face they strongly appear to be tailored to such qualifications as the Alien described in ETA 750B.[6]

It follows that because 20 CFR § 656.21(b)(5) required the Employer to show that the qualifications in its application represent its actual minimum requirements for the job, we must affirm the CO's finding that this Employer failed to establish that it is not feasible to hire a U. S. worker without the restrictive job criteria as the CO's conclusion was supported by the evidence of record.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

FREDERICK D. NEUSNER

[6]Compare **North Central Organized Regionally for Health**, 95 INA 068 (Decided Feb. 2, 1998, as part of **Francis Kellogg, et al.**). In that case the Board affirmed denial of certification on grounds that the alien did not meet the primary job requirements, "but only potentially qualifies for the job because the employer has chosen to list alternative job requirements." The Board concluded, "Therefore, it appears that the job requirements have been tailored to the alien's qualifications, in violation of § 656.21(b)(5)."

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.